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No. 957

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES FRED BAXA and CLYDE CHURCH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States

Your petitioners, James Fred Baxa and Clyde Church respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on January 11, 1965.

JUDGMENT AND OPINION OF THE COURT BELOW

On January 11, 1965, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Southern District of Illinois, Northern Division, sentencing petitioners to imprisonment for terms of three years and four years, respectively. No Opinion was rendered by the District Court. The Opinion of the Court of Appeals has not as yet been reported, but is reprinted herewith as Appendix A.

JURISDICTIONAL STATEMENT

On a jury trial, petitioners and others were convicted of unlawful possession of chattels valued at more than $100.00 stolen from interstate commerce, in violation of Sections 2 and 659, Title 18, United States Code; and of conspiracy so to possess such chattels in violation of Section 371, Title 18, United States Code.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an Opinion filed January 11, 1965 (Appendix A).

A petition for rehearing was timely filed, and was denied on February 3, 1965 (Appendix B).

The jurisdiction of this court is invoked under the provisions of Title 18, United States Code, Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In terms of the federal conspiracy statute, is a conspiracy a group or is it an act?

Stated otherwise, the statute denounces the act of conspiring. May a court then treat a conspiracy as though it consisted of the people who are working towards a proscribed object?

2. Is there any distinction between a conspirator and one who aids and abets? And does one become a party to a conspiracy merely by aiding and abetting its conspiratorial objectives?

3. Where the evidence shows no affirmative act of withdrawal from a conspiracy, is the conspiracy presumed to continue after the arrest of all possible conspirators and the seizure by the government of the subject matter of the conspiracy?

If so, and one alleged conspirator thereafter confesses, should his confession be excluded as evidence against the other alleged conspirators,

(a) On the theory that the confession was not made in furtherance of the conspiracy?

(b) On the theory that the act of confessing is itself evidence of the withdrawal by the confessor from the conspiracy?

4. Does the sale and transfer of possession of stolen property create a conspiracy between vendor and vendee?

5. In a conspiracy prosecution, may the jury properly be instructed that as a matter of law, the government has proved that all the defendants were parties to a common design?

6. In a federal prosecution for unlawfully possessing stolen property, where the government's proof shows the circumstances under which the defendant acquired possession of the property, and where those circumstances are consistent with a hypothesis of innocence, then,

(a) May the jury be instructed that mere possession of such property is sufficient basis for an inference of guilt, unless such possession is "satisfactorily explained!"?

(b) Is the defendant entitled to a judgment of acquittal as a matter of law?

STATUTES INVOLVED

The relevant portions of all statutes are set forth within Appendix "C". The Statutes are:

a) Title 18, United States Code, Section 2.

b) Title 18, United States Code, 659.

c) Title 18, United States Code, Section 371.

STATEMENT OF THE CASE.

On October 1, 1961, a trailer load of "Westclox" trademark products disappeared from a terminal in Chicago (A. 15, 9, 10). The trailer was in interstate commerce (A. 12).

Two weeks later, the trailer was found abandoned in Joliet (A. 17), hitched to a tractor bearing the name "Jasper Motor Company" (A. 17). No further reference to the tractor, or to Jasper Motor Company, or to any investigative activity relative thereto appears in the record.

On the evening of December 14, 1961, petitioners were arrested in the well-lighted public parking lot of the "Your Choice Discount House" in Spring Valley, Illinois. Also arrested that evening were Michael Martin, the principal officer of the corporation operating the discount house; and Raymond Scheri, also associated with Your Choice.

An FBI agent testified that Your Choice was "a large department store, with . . . all types of merchandise." (A. 24). A variety of clocks was sold at the store, but none were Westclox products (A. 31). The parking lot adjacent to the store was as large as the store itself, and very well lighted, so that the officers were able to see practically every square foot of its area after dark (A. 23, 24).

Storage space for merchandise sold at the discount house was maintained at two remote locations (A. 27, 29, 39). Deliveries from the storage areas to the discount house were made by trucks and buses operated by the store for that purpose (A. 48).

About December 7, 1961, an FBI agent visited the store for fifteen or twenty minutes. He saw petitioner Baxa,

whose name he did not then know, in conversation with Martin on the sales floor.

On the evening of December 13, a store employee saw petitioner Baxa talking to Martin for an undetermined period—ten minutes to an hour (A. 37).

Both these conversations took place on the floor of the store in full view of the customers. The employee who served as a government witness admitted that he had himself held such conversations with customers (A. 39). Martin had a private office equipped with one way glass, so that its interior was not visible from the sales floor (A. 47, 49). That office was not used for those conversations.

On December 13, Baxa and Martin were still in conversation at the store's closing time. As they left, an employee heard Martin say something about driving a bus (A. 47). Baxa then drove away with a passenger whom he dropped off at Martin's home. Presumably, the passenger was Martin (A. 40-41).

The next night, December 14, at about 8:30 P.M., petitioners Baxa and Church arrived at the discount house in separate cars. They entered Martin's office. After fifteen minutes, an employee brought coffee to them (A. 46). Ten or fifteen minutes later, Scheri was summoned to the office. He stayed for about a minute, then left with petitioners. Martin was overhead saying to Scheri, "Hurry up and help the gentlemen, help load." (A. 47).

Scheri walked to one of the store's trucks[1]. Church drove

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[1] On opening statement, Scheri's lawyer stated that at Martin's direction, Scheri had brought the disputed merchandise to the discount house from the storage area earlier that day. (A. 9), However, during the trial, Scheri pleaded guilty and did not testify (A. 50).

his car a short distance within the lot to the truck, where Scheri and petitioners loaded the car with merchandise from the truck. The lot was well lighted, and the government agents, although watching from a position of concealment on adjoining premises, were able to observe with no difficulty. The store appeared to be busy (A. 19, 22, 26). The agents were able to note the Westclox trademark on certain of the cartons at that time (A. 20). Petitioners made no attempt to hide what they were doing (A. 23).

After Church's car had been loaded, Baxa's car was moved to the store truck. The three men were in the process of loading merchandise into Baxa's car when the agents "moved in" (A. 20). Using a number of cars, approaching at high speed from "every direction" (A. 28), some with the lights extinguished (A. 42), agents surrounded the store truck with their vehicles (A. 44) and stopped abruptly a few feet from the truck (A. 28). Scheri moved to the side of the truck, peeked out, and then drew his head back (A. 42).

Church started to walk away, then halted when the agents identified themselves (A. 28).

An agent asked petitioner Church what he was doing. Church said he was just walking through. Indicating the car he was driving, the agent asked petitioner Church whether it belonged to him. Church replied that it did not and he did not know whose car it was (A. 42). In fact, the car did not belong to Church (A. 44), and the record is silent as to its ownership.

Baxa, Church and Scheri were then upon "apprehended" (A. 22). They were searched, and the sum of approximately $1,600 was found in the wallet of petitioner Baxa

(A. 44). The officer in charge thereupon directed that each of the men be put into a separate car with accompanying agents (A. 20). Petitioners remained in these cars for two hours (A. 23). It was a very cold night (A. 29). The FBI witness, however, testified that during this period they had not been placed under arrest; to apprehend, he explained, means to question (A. 22).

Petitioners and Scheri were each held in separate cars, and each was unable to hear what was said to the others (A. 27, 20, 23, 34). Scheri told the agents that he was in enough trouble now, and did not want to involve any one else; "If you play the game, you have got to pay"; and "It's sure true what they say about crime doesn't pay." (A. 32). These statements by Scheri were introduced against petitioners over their objection (A. 32) and motions to strike (A. 33).

Petitioners were admonished that they need make no statement and if they did it would be evidence against them (A. 44). Each of them declined to give a statement, and testimony of their refusal was introduced in evidence against them (A. 43).

Meanwhile, two agents entered the discount house and talked to Martin, who was counting money (A. 27). Martin disclaimed knowledge of any thefts. In his presence, the agents searched the store and the remote storage location, but found nothing of interest (A. 27, 29).

Thereafter, Martin was taken to each of the three cars containing petitioners and Scheri. He identified Scheri

as his partner, but stated that he had not previously seen the petitioners (A. 27). This evidence was introduced against petitioners. Subsequently, the trial judge told the jury, ". . . (T)he government has sustained its burden of connecting the testimony . . . the testimony relating to the acts and conversations and statements by the several defendants in each case is admissible, and admitted as evidence against all of the defendants whether or not each was present." (A. 46).

Certain items transferred from the store's truck to petitioners' cars, were shown to have been part of the shipment stolen in Peru. Other merchandise in the petitioners' cars, were conceded by the prosecutor to be items which petitioners "have a right to have", and to be not incriminating (A. 21).

Petitioners were indicted together with Martin and Scheri in six counts. The first five counts charged unlawful possession of stolen property, each count relating to a carton found in one of the cars. The sixth count charged a conspiracy by all four defendants unlawfully to possess stolen property (A. 1-3).

Scheri pleaded guilty in the course of the trial. Martin and petitioners were found guilty by the jury on all counts. Penitentiary sentences were imposed: four years for petitioner Baxa, and three years for petitioner Church (A. 5). By this petition, it is sought to review the opinion of the Court of Appeals affirming those judgments and sentences.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

As to the abuse of the doctrine of conspiracy

Your Honors ". . . have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404, (1957).

The warnings have not been heeded.

The bald fact is that the pronouncements of this Court concerning conspiracy prosecutions, have been almost totally ineffective. The conspiracy charge is too handy and powerful a weapon, to be used with restraint. And the conspiracy mystique has generated a paralogical vernacular of its own, with each conclusion implicit in its premise.

Thereby, the appearance of scrupulous adherence to this Court's rulings is painstakingly preserved, while the rulings themselves are effectively circumvented.

If there has been a criminal action brought in recent years in the District of moving counsel, involving more than one defendant, in which a charge of conspiracy was not made, it has escaped the attention of the writers. Even in cases where a defendant is singly charged, and the conspiratorial object allegedly completed, the charge of conspiracy is not infrequently made, in order to facilitate the reception of evidence of the private conversations of government witnesses.

For when conspiracy is charged, it is seldom done in furtherance of an attempt to punish the discrete offense denounced by the conspiracy statute.

Instead, the charge of conspiracy is ordinarily nothing more than an evidentiary technique: A means by which testimony which is logically inadmissible becomes technically competent.

The conspiracy statute, therefore, performs an office whose thaumaturgical equivalent is levitation. The conspiracy is proved by evidence which is admissible only on the theory that the conspiracy has first been proved. The resulting trial records consist in a hodge-podge of inflammatory innuendo whose dissection on appeal will defy the scalpel of the most skilled of legal surgeons. No one is quite sure, when it is all over, exactly what has been proved, or against whom.

Consider the case at bar:

The indictment against petitioners charged five substantive counts and one count of conspiracy. All of these counts were proved by showing that some eleven weeks after a theft, the petitioners acquired a quantity of goods at a discount house. Part of these goods were the product of the theft, and part of the goods completely legitimate.

All of the evidence tending to incriminate petitioners, was introduced on a conspiratorial theory of vicarious liability made possible by the conspiracy allegation. The acts of the *sellers* were shown to be corrupt, and were considered against petitioners.

And yet, no corrupt agreement was shown. There was no evidence that petitioners knew the goods were stolen, and no suggestion that they collaborated in any manner

with the thieves. Nor was it suggested that they had any concert of action with the seller of the goods. All that they did, was to take delivery. The only cooperation between petitioners and sellers, was normally and indispensably incident to the consummation of any sale.

In fact, although it would have been much easier, quicker, and more secretive to have taken delivery at the remote storage area, the goods were brought from the storage area to the discount house where petitioners took possession of the goods openly in a public place.

The only significant evidence of criminality related to the acts and declarations of the sellers, *after the arrest of all parties.* One seller lied about his activities, and the other confessed.

The evidence of those lies and confessions was admitted against petitioners on the conspiratorial theory. It was explained to the jury that the government had "sustained its burden of connecting the testimony", so that all evidence was admissible against all defendants. (A. 45-46)

But the only way that the government made any such showing, was by the evidence thus admitted.

It was then solemnly explained to the jury that evidence of the acts and declarations of others is admitted against a defendant only if a common plan exists and the defendant is shown to be a member of that plan, and if the activities tended to further the conspiracy (Gov't App. 39-40).

Thus, the limitations imposed by this Court to protect against misuse of the conspiracy doctrine, were converted into the very means of such misuse. The jury are advised that a "connection" has been proved which warrants the

admission against petitioners, of the statements of their codefendants. Then, the cautionary instructions required by this Court's decisions are given; but their only effect is to advise the jury that the prosecution has succeeded in carrying that burden.

In affirming the resulting convictions, the Court of Appeals applied four rules. Taken together, they may fairly be described as a new development in conspiracy law:

(1) A buyer conspires with his seller, as a matter of law;

(2) A conspiracy is presumed to survive the arrest of all conspirators and the seizure by the government of the subject matter of the conspiracy;

(3) A jury may be instructed to consider against a defendant, in determining his guilt, the extrajudicial statements of a co-conspirator made out of defendant's presence, and may be told that such evidence was admitted because the government has proved the defendants to be parties to a common plan.

(4) Such statements need not tend to advance the conspiracy, but need only refer to it.

The first of these rules is both a product and an illustration of widespread misapprehension of the basic nature of a conspiracy, and of a growing willingness to fit within the framework of conspiracy, any crime in which more than one person may be said to be involved.

It has been generally recognized that there is no conspiracy between buyer and seller. There is no common objective between them. The seller desires to sell, and the buyer desires to purchase; their interests are diametrically opposed. This principle was recognized by the Seventh Circuit as recently as 1963. *United States* v. *Ford*, 324 F. 2d 950, 952.

Yet, the opinion here sought to be reviewed adopts, *sub silentio* but unmistakably, a directly opposite view, less than two years after *Ford*. Thus is shown the growth potential of the conspiracy doctrine, and the weakness of its logical base.

If a citizen would know whether he is a conspirator, the statute will enlighten him only to the extent of informing him that "if two or more persons conspire" for a criminal objective, they are guilty of conspiracy. 18 U. S. Code 371, Appendix C. For further information, he must turn to judicial pronouncements. And from that source, he will learn that he need not conspire in order to become a conspirator; he need only assist a conspirator. And it cannot be denied that a buyer "assists" his seller, in some broad sense; otherwise, the seller would not sell. To complete the planned confusion, the substantive counts of the indictment referred to the statute denouncing the aiding and abetting of an offender (A. 2, Appendix C), and the jury were instructed on that theory (Gov't Appendix 38).

It has been aptly observed that "perhaps the most important factor" in the weakening of the basic principle that a conspiracy must involve an agreement,

> "... is another result of the verbal ambiguity which leads courts to deal with the crime of conspiracy as though it were a group rather than an act. ... (T)his [is] reasoning from a faulty premise—a premise difficult to discover since it is assumed rather than articulated. ..." 72 Harvard L. Rev. 933-934

And it is just such reasoning which leads the Court below to state that a conspiracy existed; that Scheri was a co-conspirator; and that therefore his admissions, after arrest, were properly introduced in evidence against petitioners, with whom he had no agreement and from whom he received no corrupt assistance.

The theory in the trial court was that the single act of receiving the goods, served to constitute petitioners as both conspirators and aiders-abettors. The distinction, when recognized, is generally not deemed important. But the failure to preserve that distinction may well be the most important single cause of misapplications of the conspiracy statute.

By legal tradition and by the express wording of the Statute, a conspiracy is an act, and not an interpersonal relationship. The crime is committed by the act of agreeing to commit an offense, and by a subsequent overt act pursuant to that agreement. If, after the agreement, another person assists the conspirators, he may well become a principal in the contemplated *substantive* offense by aiding and abetting it. But this status is *not* synonymous with that of conspirator. Mere knowledge that one is furthering an illegal enterprise is not enough to make one a conspirator. Unless the aider-abettor has at least a tacit agreement with a conspirator for the giving and accepting of help, he has certainly not conspired. Therefore, it is simply not true that every actor in the course of a conspiratorial scheme, should himself be deemed a conspirator.

It is, of course, theoretically possible to aid and abet others in the *formation* of a corrupt agreement, and thus become a principal in a conspiracy. But such a case would be quite rare.

Such refinements have given way to the concept that anyone whose deliberate acts have the effect of furthering a conspiratorial object, is himself a conspirator.

However, if one accept the highly questionable premise that petitioners, by buying, aided and abetted their sellers, it remains a matter of great significance that they did

not enter into any agreement with the sellers to furnish such help. On the contrary, as buyers, it was presumably their purpose to furnish the smallest possible amount of help by paying the lowest possible price, and to come as close as they could to furnishing no help whatever.

The significance of this distinction, is that even if their acts were wrongful and had the effect of helping the sellers, petitioners did not conspire with the sellers. Therefore, all evidence of the sellers' acts and declarations was wrongly admitted in evidence against petitioners, since the conspiratorial theory of vicarious liability was not tenable.

And most certainly, petitioners did not aid and abet the sellers in the offense charged in the indictment: possession of stolen property. To the contrary, petitioners' acts had the effect of divesting sellers of such possession.

To those prosecutors who are accustomed to finding the answers to all their problems by bringing charges of conspiracy, these distinctions may appear tenuous. But they go to the very heart of the constitutional privilege to be informed of the nature of the accusation, and to know what conduct will constitute an offense.

In a very real sense, petitioners were prosecuted on the "theory" that they had done something wrong, even if nobody was quite sure what the offense had been. The customary remedy for such a situation, is to convict the defendant of conspiracy.

Therefore, petitioners were convicted of conspiracy. It is all quite that simple.

• • •

The second rule, explicitly created by the opinion here sought to be reviewed, is a remarkable demonstration of the ability of the conspiracy doctrine to thrive and proliferate in arid soil.

In *Pinkerton* v. *United States*, 328 U.S. 640, your Honors sustained the conviction of a conspirator for a substantive offense which was the conspiratorial object, but which was physically perpetrated by a co-conspirator after the appealing defendant had been imprisoned for another offense. Your Honors pointed out that the sentence was within the limits authorized for the conspiracy count alone, but cautioned that "the addition of a conspiracy count may at times be abusive and unjust." No abuse was found, however, in that case. 328 U.S. 642-644.

Supported by that precedent, the Court of Appeals for the Sixth Circuit affirmed the conviction of a narcotics distributor who, in anticipation of his pending imprisonment on an unrelated charge, showed his co-conspirators how to mix heroin so that they would be able to maintain the distribution channel during his incarceration. *Poliafico* v. *U. S.*, 237 F. 2d 97, 106.

And now, in the case at bar, *Poliafico* is viewed as supporting the proposition that a conspiracy is presumed to continue after imprisonment of a conspirator; therefore, by logical extension, it is presumed, by the opinion below, to continue after the arrest of all possible conspirators[2]

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[2] The F.B.I. agent swore that no arrest had been made at the time; they were merely "apprehended", meaning "questioned" (A. 22). All that had happened, really, was that a group of cars had converged on the defendants; one of them, walking, had been stopped (A. 28). The three defendants thus "apprehended" were searched (A. 44), warned that anything they said

and seizure by the government of the subject matter of the conspiracy. There are no conspirators left, and nothing left to conspire about; but, hardy flora that it is, the conspiracy continues, somehow, to flower. It cannot any longer actuate a conspiratorial objective, but it is still able to produce incriminating evidence.

• • •

The third rule is simply ridiculous. Obviously, the jury may not properly be instructed that the government has proved common design; that is what the jury is there to decide. It is only after the jury has found, by evidence *aliunde,* that a defendant has committed the criminal offense of conspiracy, that it may properly impose vicarious liability for the acts and declarations of other conspirators. To instruct them, as was done here, that the connection has been established, is effectively to direct a verdict of guilty on the conspiracy count; and from this, a guilty verdict on the substantive counts is merely a matter of logical extrapolation.

Considerable poignancy is imparted to the issue when it is noted that the Court of Appeals has thereby reversed yet another of its recently-adopted positions. In *United States* v. *Pronger,* 287 F. 2d 498, 500, an instruction similar to, but substantially less pointed than that quoted in the opinion here brought for review, was deemed serious error. Now, *Pronger* has vanished, without even a citation to mark its passing.

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might be used against them in court (A. 44), and placed by armed agents (A. 22) in three separate automobiles (A. 20), where, each independent of the others, they remained "voluntarily" for two hours (A. 23) on a very cold night (A. 29), while being used as something in the nature of exhibits in the questioning of Martin (A. 29, 27). We will not argue the point. It would be nothing more than an exercise in unwholesome pedantry. Petitioners and Scheri were under arrest, and no mistake about it.

In this aspect, the opinion below reflects that court's recent and unreported opinion in *United States* v. *Allegretti, et al.* We are informed that petitions for certiorari are pending in this Court in consequence of the *Allegretti* decision: *Allegretti* v. *U. S.*, *Durlak* v. *U. S.*, and possibly others, since four cases were decided by that opinion.

But we feel impelled to say, on our own behalf, that a verdict of not guilty is a logical impossibility in any conspiracy prosecution in which that instruction is given.

Further extension of the technique of conspiracy prosecutions, would now seem both impossible and unnecessary. But perhaps this Court held that view at the time of the *Grunewald* decision. As subsequent developments have demonstrated, there will always be new and interesting challenges.

* * *

The fourth rule is a unique product of what the opinion below does not say.

The statements made by Scheri after his arrest, constituted nothing less than a confession. In fact, under questioning by Scheri's lawyer, an F.B.I. agent testified, essentially, that he considered Scheri's statements a complete admission of all requisite elements of guilt (A. 36).

It cannot be contended, even remotely, that Scheri's confession had any tendency to promote any conspiratorial objective. In theory, the only basis for admission of hearsay in a conspiracy case is that the statement be made "pursuant to and in furtherance of objectives of the conspiracy charged in the indictment." *Krulewitch* v. *United States*, 336 U.S. 440, 442-443.

Yet, this requirement is frequently ignored, and is in the process of being eroded into "little more than a test of relevancy." 72 Harvard Law Rev. 985-986.

But it has never before been suggested that a defendant bears vicarious responsibility for the *confessions* of an alleged co-conspirator.

Thus, the doctrine of conspiracy takes another giant step forward, and we are given a chilling view of its ultimate goal.

For now, responsibility for vicarious confessions finds precedent. That precedent is the opinion below. It is a typical first stride in the field. It does not expressly state that confessions will henceforth be deemed admissible against alleged co-conspirators. It simply holds that the admission of such evidence "was no error", without discussing the point. It is merely one of the "other points [which] . . . do not . . . merit further discussion."

Just as surely as lawyers read case reports, and just as soon as the opinion can be embellished with the notation "*cert. den.*", will commence the indiscriminate proliferation of that "rule". Yet another safeguard will fall.

In many ways, it is the most disquieting aspect of the opinion. The other rules therein announced, are misapplications of precedent. But this one is brand new.

And it will prove popular, in those quarters where popularity is effective.

* * *

We do not ask that your Honors find any inherent flaw in the conspiracy statute. Our complaint is directed only to the manner in which that statute has been interpreted and applied, in this and in innumerable other cases, more frequently and more extensively with each passing day.

In 1934, Clarence Darrow rendered a memorable admonition:

> "If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States." (*The Story of My Life*, 64)

Today, one short generation later, no lawyer could ask for a more singular advantage, in defending a conspiracy charge, than to be permitted to practice in accordance with the rules of construction which Darrow found onerous.

The trend will not reverse itself. We pray, fervently, that your Honors will deem this case worthy of review.

II.

As to the failure of proof

Petitioners obtained a quantity of goods from an ostensibly legitimate retail outlet. In the course of the acquisition they made no slightest effort to conceal what they were doing. After a few highly public conversations with the seller conducted some ten feet from an available place of impenetrable concealment, the purchase was arranged. The goods, stolen months earlier, were brought from hiding to the garishly lighted busy public sales outlet operated by sellers. Petitioners arrived to consummate their purchase, armed with funds adequate to buy the goods many times over on the retail market. There was delivered to them an odd admixture of legitimate goods and stolen merchandise; in fact, the stolen merchandise was the only such contraband that the seller had available, in the midst of a large quantity of legitimate goods (A. 29). When the final details had been arranged, the seller called a co-conspirator on the loud speaker and, when he reported, instructed him, in typical underworld jargon, "Hurry up and help the gentlemen, help load." (A. 47).

Every inference in the case supports the view that petitioners had no knowledge of the stolen character of the goods. If the seller had such knowledge, that fact cannot logically be imputed to the petitioners.

In the trial court the government proceeded upon the theory that whenever a man is found in possession of property ultimately shown to be stolen, he becomes obliged to demonstrate his innocence by making an explanation satisfactory to the jury. Lapse of time between theft and possession "weakens" the inference, thus presumably making it somewhat more easy to rebut; but the inference of guilt is always automatic (A. 52, 53).

This view was endorsed by the Court of Appeals, which held that "the term 'recently' is a relevant (sic) term which cannot be rigidly defined . . . Whether property may be considered 'recently' stolen depends on . . . all of the facts and circumstances . . ."

What has thus evolved, is a tight logical circle without entrance or exit. If the defendant explains satisfactorily, the "facts and circumstances" may be such that no inference of guilt will arise, so that he need offer no explanation.

To contend that *whenever* a defendant is found in possession of stolen property, it devolves upon him to make an explanation satisfactory to the jury, is a total misstatement of the law. Its sole claim to consideration is its ease of application.

The basic rule is that possession of recently stolen property serves to create an inference of *theft*, not merely guilty knowledge. Therefore, the rule was simply not applied in any case in which the lapse of time between theft and proof of possession, was sufficiently long to admit of the possibility of innocent intermediate transfer of the property. *Gargotta* v. *United States*, 77 F. 2d 977, 982-983, 8 Cir. 1935; *Kasle* v. *United States*, 233 F. 878, 889-890, 6 Cir. 1916.

After a series of transitional cases in which the "rule" was applied without regard to the time element because some other circumstance showed guilty knowledge in the defendant,[3] many case expressions have given ostensible support to the proposition that possession alone, independent of any other circumstance, will suffice to generate an inference that the possessor knows that the property has been stolen.

But in every such case that we have found, one of two elements is present: Either the evidence shows only possession, totally unembellished by any other circumstance, and totally unjustified by any known fact, or, the evidence shows some fact, in addition to mere possession, which additional fact is suggestive of guilt. See, *e.g.*, *Pearson* v. *United States*, 192 F. 2d 681, 689-693, 6 Cir. 1951 (receipt of stolen whiskey at a point predictable only by the thief and transferring it to another truck under illegal circumstances); *United States* v. *Valenti*, 309 F. 2d 419, 420, 7 Cir. 1962 (other "stubborn facts pointing plainly to his guilt"); *United States* v. *Carengella*, 198 F. 2d 3, 6, 7 Cir. 1952 (sale at an absurdly low price under circumstances otherwise suspicious); *Janow* v. *United States*, 141 F. 2d 1017, 1018, 5 Cir. 1944 (sale of cigarettes outside normal channels at one-third their market value); *Yielding* v. *United States*, 173 F. 2d 46, 48, 5 Cir. 1949 (sale of automobiles after dark in a country churchyard for half price with a statement that they were "hot").

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[3] *Levi* v. *United States*, 71 F. 2d 353, 354, 5 Cir. 1934, applied the inference from possession of automobiles with altered motor numbers purchased at prices much below market from persons of low repute, and resale of the vehicles without keeping records; *Bruce* v. *United States*, 73 F. 2d 972, 974, applied the inference in a case wherein there was a strong suggestion that the possessor was the actual thief, and where the possessor made false statements to the police.

The correct statement of the rule is as follows: Unexplained and exclusive possession of recently stolen property, where no other fact appears tending to justify that possession or render it reasonable, suffices to generate an inference that the possessor was the thief who stole that property; *a fortiori*, since he was the thief, he knows that the goods were stolen. *Corey* v. *United States*, 305 F. 2d 232, 238, 9 Cir. 1962; *Wilson* v. *United States*, 162 U.S. 613, 619-620.

Each intermediate transfer renders it less likely that the possessor was the thief or an accomplice of the thief, and therefore weakens the presumption of guilt. The number of successive transfers, therefore, is at least as important as the time interval (*Cf.* A. 52) in determining whether guilty knowledge can be imputed to a possessor at any given stage. *Pearson* v. *United States*, 192 F. 2d 681, 698, 6 Cir. 1951.

And where the proven circumstances of the acquiring of possession are such as to negate the inference that the possessor was the thief, something more than mere possession must be shown in order to render tenable an inference that the possession is criminal in its nature. *Cherry* v. *United States*, 78 F. 2d 334, 336, 7 Cir. 1935.

It has never been the law, that where the source of the possession is known to the jury and no incriminating circumstance appears, mere possession is in itself sufficient to cast upon the possessor the burden of explaining his possession. Such a rule would improperly shift the burden of proof to the defendant. *United States* v. *Allegrucci*, 258 F. 2d 70, 73, 74, 3 Cir. 1958. The similarity of the case at bar, to *Allegrucci*, is striking. The court's instruction (A. 52, 53), and the prosecutor's insistence that the defense had not explained the "uncontradicted" evidence

(A. 51) served improperly to put the burden of proof where it did not belong: *i.e.*, on the defense.

As the case at bar was viewed in the court below, the issue was one of arithmetical simplicity and Euclidean precision. There was evidence that the defendants possessed the goods. The goods had been stolen. No satisfactory "explanation" was offered *by the defense.* The inference was not overcome. Thus, there was really nothing for the jury to decide. The defendants had been "proven" guilty. No other finding would have been logically possible as the case was explained to the jury. (A. 52, 53).

But viewed properly, the case takes on quite a different aspect. It is this: In showing that the defendants possessed the stolen goods, the government made proof strongly suggesting that the defendants were not themselves the thieves. The government proved that the goods were acquired under orderly and non-incriminating circumstances, and in a plausible market. There was no suggestion in the evidence that the defendants, as purchasers, had any knowledge or any reason to know that the goods were stolen. Thus, the circumstances are shown to be as consistent with innocence as with guilt. Therefore, there is no inference that the possession by the defendants was criminal in its character, and there is a total failure of proof to support guilt.

The very kindest thing that could be said of the government's case, is that the circumstances do not disprove guilt. That is assuredly not enough to sustain a conviction.

Petitioners were convicted less by the evidence, than by the nature of the charge and the acts and statements of others for whom petitioners bore no proper responsibility.

CONCLUSION.

The opinion below presents an unprecedented extension of the reach of the conspiracy statute. It also presents an evidentiary picture which cannot exclude the possibility of petitioners' innocence.

We pray that your Honors will consider this a fit case to warrant this Court's intervention.

Respectfully submitted,

MELVIN B. LEWIS
HOWARD W. MINN
Attorneys for Petitioners.

APPENDIX "A"

In the

United States Court of Appeals

For the Seventh Circuit

No. 14386 SEPTEMBER TERM 1964 JANUARY SESSION 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
JAMES FRED BAXA and
CLYDE CHURCH,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

JANUARY 11, 1965

Before DUFFY, KNOCH and SWYGERT, *Circuit Judges.*

DUFFY, *Circuit Judge.* As a result of a jury trial, defendants Baxa and Church were found guilty of charges contained in a six-count indictment. Count One charged Baxa and Church, together with defendants Michael D. Martin and Raymond J. Scheri, with possession of goods, exceeding $100 in value, which had been stolen from a shipment in interstate commerce, and that at the time of such possession, said defendants knew the goods had been stolen, in violation of Sections 2 and 659, Title 18 U.S.C.

Counts Two through Five made identical charges as those in Count One except that each charge related separately to one of the cartons of merchandise mentioned

in Count One. Count Six charged the four defendants with conspiracy and charged the conspiracy covered a period from and before October 1, 1961 to and including December 14, 1961.

At the conclusion of the Government's case, defendant Scheri entered a plea of guilty. The jury returned a verdict of guilty against the other three defendants. Defendant Martin filed a notice of appeal but did not pursue the matter further. Defendants Baxa and Church, in this joint appeal, claim errors arising out of the instructions of the Court, rulings on evidence and the failure of the trial court to grant a motion to direct a verdict.

Michael Martin was the principal officer of a corporation which operated "Your Choice Discount Center" near Spring Valley, Illinois. Defendant Scheri held a supervisory position in the store. Martin, at times, referred to Scheri as his partner. Martin's wife held some position in the store and signed most of the checks.

During the night of October 1, 1961, a truck was dispatched from Peru, Illinois, carrying a large quantity of products of General Time Corporation, which used the trademark "Westclox." The products were packed in cartons and were being shipped to various points in California, Massachusetts and New Jersey. Most of the cartons which were stolen contained clocks. The loaded truck disappeared from a trailer dock in Chicago. Two weeks later the trailer was found abandoned in Joliet, Illinois, and the cartons had been removed.

The Discount Center occupied a building 75′ x 100′. Adjoining was a parking lot of about the same dimensions which was well lighted at night. The store carried all types of merchandise, including clocks.

On the mezzanine above the sales floor was a series of four offices. One was used by Martin, the manager of the store. His office was equipped with a 1-way glass which enabled persons inside the office to view the sales floor, but rendered the occupants invisible from the sales floor itself.

Storage space for merchandise to be sold at the store was maintained at two known locations. Merchandise deliveries to the store were made by the use of two trucks and several buses owned by the store corporation. The store employed a number of employees in addition to those hereinbefore described. These employees apparently were paid on an hourly basis.

For some time the store was kept under surveillance by FBI agents. On one occasion, an agent saw Baxa there, in conversation with Martin. On December 13, Baxa's auto was seen leaving the store. It proceeded to the rear of a tavern behind which both Scheri and Martin lived.

On December 14, at about 8:30 p.m., Baxa and Church drove to the Discount Store parking lot in separate cars. They parked their cars, entered the store and walked directly to Martin's office where they remained for some fifteen minutes. Scheri was called to the office but left shortly thereafter with Baxa and Church. Martin was heard by a clerk telling Scheri—"Hurry up and help the gentelmen, help load."

Scheri walked to one of the trucks in the parking lot and Church brought his car within a short distance of that truck. Baxa, Church and Scheri then proceeded to load Church's car with cartons from the truck. The FBI agents were able to note the Westclox trademark on certain of the cartons.

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For some time the store was kept under surveillance by FBI agents. On one occasion, an agent saw Baxa there, in conversation with Martin. On December 13, Baxa's auto was seen leaving the store. It proceeded to the rear of a tavern behind which both Scheri and Martin lived.

On December 14, at about 8:30 p.m., Baxa and Church drove to the Discount Store parking lot in separate cars. They parked their cars, entered the store and walked directly to Martin's office where they remained for some fifteen minutes. Scheri was called to the office but left shortly thereafter with Baxa and Church. Martin was heard by a clerk telling Scheri—"Hurry up and help the gentelmen, help load."

Scheri walked to one of the trucks in the parking lot and Church brought his car within a short distance of that truck. Baxa, Church and Scheri then proceeded to load Church's car with cartons from the truck. The FBI agents were able to note the Westclox trademark on certain of the cartons.

When Church's automobile was loaded, he moved it a short distance away and Baxa's car was brought close to the truck. The three men were in the process of loading merchandise from the truck into Baxa's automobile when the FBI agents "moved in."

Baxa admitted the car he was driving was his. Church said he didn't know who owned the other car and advised an FBI agent that he was merely walking through the lot. It later developed that Church, in fact, was not the owner of the automobile he was using.

When Baxa was searched, approxibately $1600 currency was found on his person. Both Baxa and Church were advised that they would not have to make any statement and that if they did, it could be used against them in court. Each declined to make a statement.

Martin was taken to each of the cars containing the other defendants. He identified Scheri as his partner, but he claimed that he had not previously seen Baxa or Church.

On this appeal, the evidence must be viewed in a light most favorable to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80. We think the jury was justified in drawing the inference that the goods were recently stolen and that defendants Baxa and Church had knowledge of the stolen character of the goods.

The term "recently" is a relevant term which cannot be rigidly defined in months, weeks or days. Whether property may be considered "recently" stolen depends on the nature of the property and all of the acts and circumstances shown by the evidence. Furthermore, it should be noted that the Court instructed the jury: "If any possession which the accused may have had of re-

cently stolen property is consistent with innocence, then the jury should acquit the accused."

We hold the trial court did not err in admitting statements by defendant Scheri which were made during questioning at the scene of the crime. There was ample evidence of the existence of a conspiracy, and Scheri was shown to be a co-conspirator. There was no evidence that the conspiracy had ended. In fact, a presumption existed that the conspiracy continued. *Poliafico* v. *United States*, 6 Cir., 237 F.2d 97, 106.

Scheri was asked who sent him to handle the stolen goods. He answered—"Well, I am in enough trouble now. I don't want to get anyone else into any trouble." He also said—"If you play the game, you have to pay", and "It's sure true what they say about crime doesn't pay."

We hold there was no error due to the admission into evidence of such statements.

Perhaps the principal point relied on by appellants herein is a claimed error in the instructions to the jury. The instruction reads:

> "The Court: Ladies and gentlemen of the jury will you please give me your attention: From time to time objections have been made by defendants to testimony as to acts and conversations and statements being had or made by one or more of the defendants, but out of the presence of the other defendants. Now, when objections were made by the defendant Baxa, the defendant Church and the defendant Scheri I overruled those objections at the time they were made. Now, when objection was made by the defendant Martin I sustained certain of those objections, and then in the case of some of the subsequent witnesses I reserved my ruling on the objection of the defendant Martin.

"Having heard the testimony, I now rule that the government has sustained its burden of connecting the testimony, and at this time I therefore overrule each objection as to my ruling which reserved—and overrule all of the objections that were sustained, and I now rule that the testimony relating to acts and conversations and statements by the several defendants in each such instance is admissible, and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made. I therefore instruct you that you may consider the testimony of the character above-mentioned as evidence against each of the defendants who were not then present as well as against those defendants who are shown by the testimony to have been then present and participating in such acts, statements and conversations."

At the time of the oral argument in the instant case, much comment was made as to the effect of our decision in *United States of America* v. *James Allegretti,* Nos. 13915-18, handed down on April 22, 1964. We there, by a two to one decision reversed Judge Mercer by reason of an instruction quite similar to the one hereinbefore quoted, and given by the same Judge. Although it has been argued that the instruction in *Allegretti* was more clearly error that the one given in the case at bar, it should be noted that we granted a rehearing *en banc* in *Allegretti;* a reargument has been held, and on December 22, 1964, our decision was handed down affirming the judgments of conviction and specifically holding the questioned instruction was not prejudicial error.

We have considered other points raised by the appellees herein but we do not think they merit further discussion.

As we find no prejudicial error in the case at bar, the judgments of conviction are

AFFIRMED

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

In The

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Wednesday, February 3, 1965
Before:
Hon. John S. Hastings, Chief Judge

United States of America,
Plaintiff-Appellee

-vs- No. 14386

James Fred Baxa and Clyde Church,
Defendants-Appellants

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby DENIED.

APPENDIX "C"

Relevant portions of certain sections from Title 18 U. S. Code:

Section 2 provides:

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

Section 371 provides, in relevant part:

If two or more persons conspire . . . to commit any offense against the United States . . . and one or more of such persons do any act to effect the object of the conspiracy, each shall be (punished).

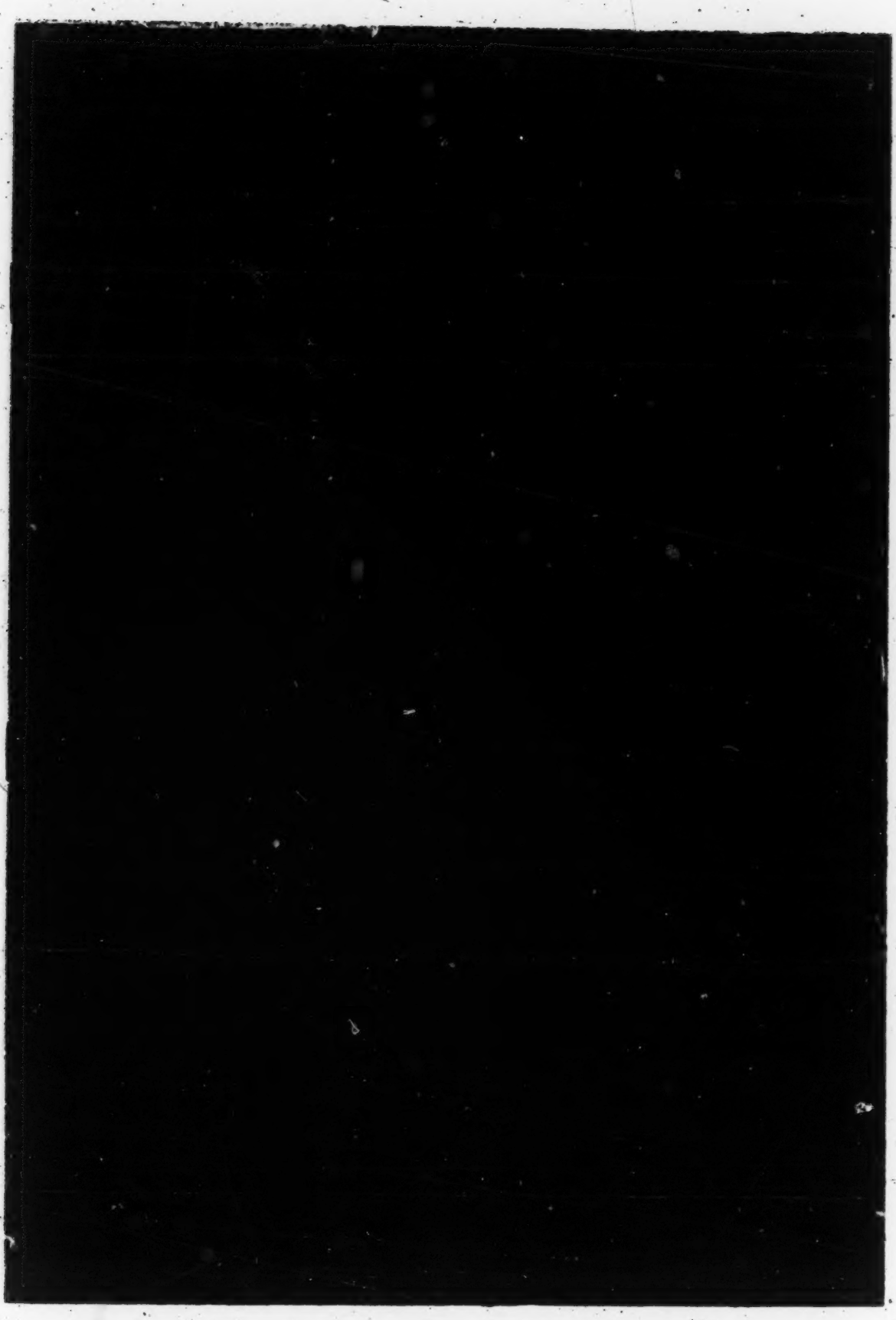
Section 659 provides, in relevant part:

Whoever . . . steals, or unlawfully takes . . . from any . . . motor truck, or other vehicle . . . with intent to convert to his own use any goods or chattels moving as or which are a part of . . . an interstate . . . shipment of freight or express; or

Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been . . . stolen;

* * *

Shall in each case be (punished).



In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 957

JAMES FRED BAXA AND CLYDE CHURCH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals is reported at 340 F. 2d 259 (Pet. App. 1–7).

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1965. A petition for rehearing was denied on February 3, 1965. The petition for a writ of certiorari was filed on March 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supported the conviction of petitioners for possessing goods stolen from a

772-976—65

truck moving in interstate commerce and for conspiracy.

2. Whether the court committed reversible error in admitting inculpatory statements of a co-defendant.

3. Whether the court, in ruling upon an evidentiary motion, properly instructed the jury that the acts and statements of each defendants could be considered as evidence against all since the government had sustained its burden of connecting the testimony.

STATUTES INVOLVED

18 U.S.C. 659 provides pertinently:

> Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled * * *
>
> * * * * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both * * *.

18 U.S.C. 371 provides pertinently:

> If two or more persons conspire either to commit any offense against the United States,

or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

Petitioners and co-defendants Martin and Scheri were indicted in the United States District Court for the Southern District of Illinois for possessing and conspiring to possess goods stolen while moving in interstate commerce, in violation of 18 U.S.C. 371, 659 (A.A: 1–3).[1] Scheri pleaded guilty at the conclusion of the government's evidence (A.A. 50). The other three defendants were convicted. Petitioners Baxa and Church were sentenced to imprisonment for four years and three years, respectively (A.A. 4–5). Martin did not pursue an appeal (Pet. App. 2). The court of appeals affirmed, 340 F. 2d 259.

1. On October 1, 1961, a trailer of the Wilson Trucking Company, which contained Westclox products worth more than one hundred dollars disappeared in Chicago in the course of an interstate journey (A.A. 9–17). Some of the stolen items were recovered on December 14, 1961 at the parking lot of "Your Choice Discount Store" in Spring Valley, Illinois, an enterprise operated by co-defendants Martin and Scheri. Within the two-week period be-

[1] "A.A." refers to appellants' appendix, "G.A." to the government appendix and "Tr." to the trial transcript which the government is lodging with the Court.

fore that date, Baxa had been observed speaking to Martin on several occasions, once for about an hour. On December 13, about midnight, he had driven someone from the store to the residence of Martin and Scheri (A.A. 31, 36–37, 40–41, 47).

On December 14, at about 8:00 to 8:20 p.m., Baxa drove a 1954 Buick on to the parking lot, followed shortly afterward by Church, driving a 1958 Buick. Petitioners, after conversing briefly, entered the store and conferred with Martin in his office for about thirty minutes (A.A. 19, 26, 41, 46–47; G.A. 4). Scheri was summoned to the office, where he remained briefly and then came out with petitioners. Martin told Scheri to hurry up and help the gentlemen load (A.A. 46–47). Baxa and Scheri walked to the rear of the parking lot, while Church drove the 1958 Buick to the rear and parked it next to a Chevrolet panel truck. The three men then transferred a number of cartons with Westclox markings from the truck to the 1958 Buick. This car was then moved while Church brought up the 1954 Buick, which they started to load (A.A. 19–20, 26; G.A. 5–7).

At this juncture, several F.B.I. agents began closing in. Scheri was seen peeking in the direction of the approaching agents and then drawing back. One of the agents greeted petitioners by name but received no response (A.A. 42–45; G.A. 21). Replying to the agent's questions, Scheri said that he was helping load but did not know what it was he was loading. He said he was following orders but refused to say who had given them. Baxa admitted that the 1954 Buick belonged to him. Church said that he did not know

to whom the 1958 Buick belonged and that he was only walking through (A.A. 42; G.A. 22). Baxa was found to have $1,629.81 on his person (A.A. 44). The cartons were seized, and it was observed that their shipping labels had been removed (A.A. 13, 17; Tr. 73–74, 132).

Petitioners and Scheri were taken to separate cars. After their rights were explained to them, petitioners declined to make a statement. Scheri, however, declared that he was a partner in the store with Martin and William O'Connor, that he was loading merchandise and that the store had sent him. When asked by the agent exactly who had sent him, he said, "Well, I am in enough trouble now. I don't want to get anyone else into any trouble." When asked what he was doing moving stolen merchandise into another car, he said, "If you play the game, you have got to pay" and, later, "It's sure true what they say about crime doesn't pay" (A.A. 32). Petitioners objected to this testimony and moved to strike the conversation on the ground that it took place outside their presence (A.A. 32, 33).

Meanwhile, other agents had gone to the office of co-defendant Martin. Martin denied knowing that anyone was unloading anything from the store truck. He stated that he did not handle Westclox products.[2] At the invitation of Martin, the agents looked around the store and at a church used for storage, then returned to the parking lot. Accompanied by Martin, they went to each of the cars where the three other

[2] The store offered for sale other clocks and watches, not including Westclox (A.A. 31, 34).

defendants were seated. Martin identified Scheri as his partner in the store but denied ever having seen petitioners before; he specifically denied having seen petitioners in the store earlier in the evening. There was no objection to this testimony (A.A. 27; G.A. 9–12).

2. In the earlier part of the trial, the court overruled objections by petitioners and Scheri with regard to testimony. The court sustained or reserved ruling on similar objections by Martin on the ground that he had not been connected with the alleged conspiracy (A.A. 21, 26, 32, 35; G.A. 21). However, after testimony had been introduced that Martin talked with Baxa in the store about a week and a half or two weeks before the incident and again on the night before, after which Baxa had driven somebody from the store to the residence of Martin and Scheri, the court admitted all testimony in evidence against all defendants (A.A. 45). When the jury returned, the court told them (A.A. 45–46):

> Ladies and gentlemen of the jury, will you please give me your attention? From time to time objections have been made to testimony as to acts and conversations and statements being had or made by one or more of the defendants, but out of the presence of the other defendants.
>
> Now when objections were being made by defendant Baxa, defendant Church and defendant Scheri I overruled those objections at the time they were made. Now, when objections was made by the defendant Martin I sustained certain of those objections, and in the case of

some of the subsequent witnesses I reserved my ruling on the objection of the defendant Martin.

Having heard the testimony, I now rule that the government has sustained its burden of connecting the testimony, and at this time I therefore overrule each objection as to my ruling which reserved[2]—and overrule all of the objections that were sustained, and I now rule that the testimony relating to the acts and conversations and statements by the several defendants in each such instance is admissible, and admitted as evidence against all of the defendants whether or not each was present when such acts were done, such conversations were had or such statements were made.

I therefore instruct you that you may consider the testimony of the character above mentioned as evidence against each of the defendants who were not then present as well as against those defendants who are shown by the testimony to have been then present and participating in such acts, statements and conversations.

All defendants objected to this ruling but none objected to the form of the instruction (A.A. 46).[3] The court, in its final charge to the jury, instructed them not to consider what others may have said or done

[2] The objections were as follows (Tr. 407–408):

Mr. Piragine. May I for the record make an objection on behalf of the defendant Martin?

The Court. Yes. The record may so show.

Mr. Cassidy, Sr. The defendant Scheri in his own behalf only joins in the objection.

The Court. Is that true as to Mr. Baxa and Mr. Church?

Mr. O'Connor. Yes, your honor.

The Court. Yes. The record may so show.

in determining whether or not a defendant was a party to a common plan, but only what each defendant himself said or did. If membership in a common plan was so shown, then acts or statements of the other members in furtherance of the plan might be considered (G.A. 39–40, 42).

DISCUSSION

We have set forth the facts bearing upon each of the three legal issues presented by this case. In the view we take, however, there is no occasion for the Court to consider the sufficiency of the evidence and the correctness of the trial court's instructions (questions 1 and 3, *supra*). We are persuaded that petitioners are correct in their claim (question 2) that it was reversible error for the trial court to admit testimony regarding Scheri's self-incriminatory statements to the F.B.I. ("If you play the game, you have got to pay" and "It's sure true what they say about crime doesn't pay.") without instructing the jury that this testimony was to be considered only against Scheri and not against the other defendants.

The governing legal principles were accurately stated by the court of appeals but were incorrectly applied, we think, to the present facts for two reasons. First, it seems probable that, at the time these conversations took place, the conspiracy was at an end, since all of its members had been apprehended (if not formally arrested) by the F.B.I. Second, even if the conspiracy was still going on, Scheri's admissions were not "made pursuant to and in furtherance of [its] objectives." *Krulewitch* v. *United*

States, 336 U.S. 440, 442–443. There is no indication that the statements were made with a view to shielding Scheri's co-conspirators or throwing the investigators off the track. Thus, here, as in *Fiswick* v. *United States,* 329 U.S. 211, 217, "confession or admission by one co-conspirator after he [had] been apprehended [was] not in any sense a furtherance of the criminal enterprise." Accordingly, the testimony was inadmissible against Scheri's co-conspirators, none of whom was present at the time the statements were made. Petitioners were therefore entitled to a limiting instruction at the time the evidence was admitted and to an instruction directing the jury to disregard the testimony altogether when Scheri pleaded guilty at the end of the government's presentation.

Ordinarily we would urge that a case such as this be remanded to the court of appeals for a determination as to whether the erroneous evidentiary ruling, viewed in the context of the whole trial, was prejudicial. In this instance, however, we do not advocate such a course, for we are unable, in all candor, to deny the likelihood that the verdict may have been influenced by the improperly admitted statements. To be sure, Scheri's admissions did not refer to petitioners by name. But in view of the independent evidence linking the four defendants, we cannot say with "fair assurance" that the jury did not interpret them as indirectly implicating petitioners as well. *Kotteakos* v. *United States,* 328 U.S. 750, 764–765.

CONCLUSION

We accordingly believe that the petition should be granted and the cause remanded for a new trial.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
FRED M. VINSON, JR.,
Acting Assistant Attorney General.
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

MAY 1965.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

JAMES FRED BAXA and CLYDE CHURCH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY MEMORANDUM FOR PETITIONERS

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May It Please The Court:

The government has candidly and commendably expressed agreement with our contention that the admission against petitioners of the sellers' confession was error.

For that reason, viewing that error alone as completely decisive of the case, the government has made no comment on our other contentions.

We would not be thought ungrateful for the candor and fairness with which the government has responded to our petition. Although we believe that there was a failure of proof, we welcome the prospect of a new trial in preference to petitioners' present plight. But if a retrial should be deemed appropriate, we are hopeful that such trial will be a completely fair one, avoiding the misapplication of the conspiracy doctrine which tainted the previous proceedings.

Within our original petition, we attempted to make the following points:

1. There was no competent evidence of petitioners' guilt.

2. This case exemplifies the current tendencies basically to misapply the conspiracy doctrine. The loose denunciation as a conspiracy of any crime involving more than one person, should be arrested—particularly because of the evidentiary consequences of the theory of vicarious liability.

3. Even within the conventional conspiracy framework, the result below was unwarranted. To instruct the jury that common design has been proved, is effectively to direct a verdict of guilty. And there is no possible justification for permitting the jury to consider against petitioners, the post-apprehension confession of the seller.

Summarily to grant a retrial on the basis of the wrongful admission of the sellers' confession, will merely delay the presentation of the other contentions in this court. For to order a re-trial might be considered an endorsement, *sub silentio*, of the sufficiency of the evidence. Also, it is quite possible that on retrial, petitioners will again be viewed as having conspired with the sellers by the mere

act of buying. The instruction that the government has proved common design has proved popular and thus might well be given again.[1] In those circumstances, both the basic misapplication of the doctrine of conspiracy and the erroneous procedure within the framework of conventional conspiracy doctrine, will have survived this court's reversal of petitioners' conviction.

Petitioners are understandably anxious that those issues be resolved in advance of a second trial. Such a determination might well render further proceedings unnecessary.

But it is the importance of the federal questions presented by the petition, and the constitutional dimensions of the problems generated by expansion of the doctrine of conspiracy, which impel our suggestion that the case warrants this Court's plenary consideration.

Accordingly, we suggest that the granting of the petition and the remandment for new trial should not be limited to the government's concession of error.

In closing, we would make clear our gratitude for the Solicitor General's response to our petition. Moving counsel, in their presentations for the defense, will be mindful of the example he has set.

Respectfully submitted,

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HOWARD W. MINN
Attorneys for Petitioners

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[1] We are informed that three other petitions for certiorari based in part on the same instruction, are presently pending in this Court.